**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT OF KENYA**

**AT MALINDI**

**CIVIL APPEAL NO. 5 OF 2009**

*(BEING AN APPEAL FROM THE JUDGMENT OF THE HONOURABLE SENIOR RESIDENT MAGISTRATE*

*J. NDURIA DELIVERED ON 5TH FEBRUARY 2009 IN KILIFI SRMCCC NO. 188 OF 2005, EMMANUEL NGADE NYOKA -VS- KDHEKA MUTISYA)*

**KADHEKA MUTISAY NGATA.....APPELLANT**

**=VERSUS=**

**EMMANUEL NGADE NYOKA.....RESPONDENT**

**AND**

**1. SCHWAZ HELDI SIEGLINDE &NDILIMA MAINGI NGUNDA**

**2. GEORGE WINJIRA**

**3. CHARO KISAO TITO.....INTERESTED PARTIES**

**J U D G M E N T**

**Introduction**

1. The Memorandum of Appeal has nine (9) grounds. However, the Appellant has opted to pursue grounds number 2, 3 and 8 which are framed as follows:

**(a) That the Honourable Senior Resident Magistrate erred in law and fact in not finding that the relief of specific performance was not available to the Respondent given that the suit property was Agricultural land thus bringing into play the provisions of Section 6 of the Land Control Act.**

**(b) That the Honourable Senior Resident Magistrate erred in law and fact in not finding that the Respondent's witness number 1 was an incompetent and impartial witness.**

**(c) THAT the Honourable Magistrate erred in law and in fact in failing to correctly evaluate**

**the evidence on record and hence misdirected himself in all his findings relating to the true state of facts in the matter.**

2. The parties agreed to dispose of the Appeal by way of written submissions .

**Appellant's case**

3. The Appellant's advocate submitted that PW1, the Respondents Advocate, admitted during cross-examination that the suit property was agricultural land and consequently, the Sale Agreement between the Appellant and the Respondent which was produced as Plaintiff exhibit 3 was hinged on the obtaining of the consent of the Land Control Board.
4. According to counsel, the Sale Agreement itself provided that the vendor shall obtain the consent of the Board which consent was never obtained. This position was admitted by PW1 who stated that the vendor (the Appellant) had refused to obtain the consent of the board and he consequently advised the Respondent to file a suit and seek for specific performance.
5. The Appellant's advocate further submitted that PW2, the Respondent, confirmed in his evidence that the consent of the Board was never obtained and that was why he, PW2, had filed a suit as against the Appellant.
6. However, it was submitted, the magistrate found in her Judgment that the Defendant (the Appellant) did apply and obtained the consent of the Board was not true. That, it was urged, was misdirection on the part of the trial court.
7. Counsel relied on the decision of the Court of Appeal in **Wamukota Vs Donati; Kisumu Civil Appeal number 6 of 1986** which held that **an agreement to a controlled transaction becomes void for all purposes at the expiry of 6 months after the making of the agreement if the application for the consent of the Board has not been made.**
8. Consequently, it was submitted, the agreement of 10th March 1999 was caught up by the provisions of the Land Control Act.
9. It was further submitted that the Appellant's Application for stay of execution of the Judgment of the lower court pending the hearing of the Appeal was refused by Omondi J. However, while this Appeal was pending, the Respondent sub-divided the suit property and sold the same to third parties who have since been enjoined in this Appeal as Interested Parties.
10. Counsel submitted that pursuant to the well-established doctrine of *lis pendens*, a party should not be allowed to carry out transfers of property when court proceedings are pending.

**The Respondent's case**

11. The Respondent's counsel submitted that the Record of Appeal is fatally defective because it does not comply with the repealed Order XLI Rule 1 (a) of the Civil Procedure Rules.
12. According to counsel, under the said Rule, the Memorandum of Appeal should always be accompanied by a certified copy of the decree or order appealed from. The current record does not have a certified copy of the Decree appealed from and should therefore be struck out with costs.
13. Counsel finally submitted that the Appellant entered an agreement of sale and received the full purchase price. He should therefore not be allowed to keep the land and the money at the same time.

**Interested Parties case**

14. The interested parties advocate submitted that his clients are innocent purchasers for value without notice; that they successfully purchased their property and the right to property is sacrosanct and that it should not be interfered with without a good reason.
15. According to counsel, a vendor who changes his mind and refuses to obtain the consent of the Board is motivated by the sole purpose of defrauding the purchaser; that the Sale Agreement put the burden of obtaining the land control board consent on the lap of the Appellant which he did not do.

**Analysis and findings**

16. The Respondent has submitted that the Appeal should be struck out because the Record of Appeal does not have a certified copy of the decree pursuant to the provisions of Order XLI Rule 1 of the repealed Civil Procedure Rules.
17. It is true that the Civil Procedure Rules provides that every Memorandum of Appeal must be accompanied by a certified copy of the Decree appealed against, and where a certified copy of the Decree is not filed together with the Memorandum of Appeal, the Decree shall be filed within such time as the court may order.
18. The word "Decree" has been defined by the Civil Procedure Act, Cap 21 to include Judgment. In fact, the Civil Procedure Act has provided at section 2 that a Judgment shall be appealable notwithstanding the fact that a formal Decree in pursuance of a Judgment may not have been drawn up or may not be capable of being drawn up.
19. The Record of Appeal has a certified copy of the Judgment of the trial court. Consequently, the Record of Appeal is competent notwithstanding the fact that a formal Decree was not included in the Record of Appeal in view of the provisions of section 2 of the Civil Procedure Act.
20. The other issue that I am supposed to determine in this appeal is whether the suit property was agricultural land and if it was, whether the consent of the Land Control Board was required in the circumstances of the case.
21. The Respondent field a Plaint in the lower court claiming for an order of specific performance of the agreement dated and executed on 10th March 1999. According to paragraph 5 of the Plaint, the Defendant (the Appellant herein) agreed to obtain the necessary consent of the Land Control Board and executed the transfer forms in respect to the suit property within 90 days from the date of signing the agreement.
22. In the defence, the Defendant (The Appellant herein) denied that he sold the suit property and that the sale agreement of 10th March 1999 was a forgery.
23. The trial magistrate, upon analysing the evidence tendered, found that the Plaintiff had proved his case on a balance of probability and allowed the prayer for specific performance of the agreement of 10th May 1999.
24. The Agreement of 10th May 1999 was produced in evidence as Plaintiff exhibit number 3.
25. PW1 was the advocate who acted for the Plaintiff in the sale transaction. PW1 informed the trial court that the purchase price of Kshs.450,000 was paid to the Appellant in his presence. During cross-examination, PW1 stated that the suit property was agricultural land. He further stated that the Plaintiff had informed him that the Defendant (Appellant) had refused to obtain the consent of the Land Control Board and he consequently advised him to file the suit for specific performance.
26. PW2 informed the trial court that the Appellant was supposed to effect the transfer after obtaining the consent of the Land Control Board within 90 days. He further stated that the consent of the Board was obtained but not within 30 days. In cross examination, PW2 stated as follows:

"**Your honour, the lawyer is confusing me, the consent was not obtained to transfer the property to me and that is why we are in court."**

27. From the pleadings and the evidence of PW1 and PW2, the suit property was agricultural land as at the time of the trial. Indeed, the suit was filed in the lower court primarily because the Defendant (Appellant) had refused to obtain the consent of the Board pursuant to the provisions of the Sale Agreement of 10th March 1999.
28. In addressing the issue of whether the Consent of the Board was obtained, the learned magistrate stated as follows in his Judgment:

**"The Defendant then applied for and obtained the appropriate land control consent."**

29. The finding by the trial magistrate that the consent of the Land Control Board was applied for and obtained by the Defendant (Appellant) was misdirection because no evidence was tendered before him to that effect. To the contrary, the Plaintiff (PW2) and his advocate (PW1) stated that they had filed the suit for specific performance because the Defendant (Appellant) had declined to obtain

the Consent of the Board.

30. In view of the fact that the suit property was agricultural land, a fact which is acknowledged in the Sale Agreement and by the testimony of PW 1 and PW 2, the Consent of the Land Control Board was supposed to be obtained within 6 months of the making of the Sale Agreement. That is what the provisions of Section 6 of the Land Control Act require of parties who enter into a Sale Agreement in respect to Agricultural Land.
31. There is a long chain of decisions by the High Court and the Court of Appeal where it has been held that where no consent of the Land Control Board had been granted, the sale of agricultural land becomes void after a period of six months.
32. In the case of **Gabriel Makokha Wamukola Vs Sylvester Nyongesa Danati, Civil Appeal No. 6 of 1996** and in the case of **Githinji and another VS Munene Irangi; Nyeri Civil Appeal No. 131 of 1987**, the sale of the suit land was set aside by the Court of Appeal because the consent of the relevant land control board was never obtained.
33. The provisions of section 6 (1) are mandatory in nature, and this court, like all the other courts are bound by it. This section has been a subject of many legal disputes owing to the fact that many people dealing in agricultural land have negligently or ignorantly failed to seek the consent of the board thus rendering the transactions void for all intents and purposes under the Act.
34. The phrase "void for all purposes" was interpreted in **Onyango and Another VS Luwayi (1986) KLR 513-516** by the Court of Appeal as follows.

> **"An agreement that is held to be void for all purposes could not be the basis for a reference to a panel of elders. If a transaction is void for all purposes, nothing of it is left that could constitute a case of a civil nature. No complaints of any nature remain to be resolved after a transaction related to agricultural land is held to be void. For that reason, the appellant's case that there was an issue of trespass which could be referred to elders is unsuitable. The words "void for all purposes" must be interpreted to mean what they say."**

35. Of course, there has been valid criticism against the Land Control Act because it has been used time and again by sellers to defraud purchasers of agricultural land. However, the said criticism remains just as such, criticism. In **Kairuk-vs-Kariuki**, Law J.A**.** stated as follows;

> **"When a transaction is clearly stated by the express term of an Act of Parliament to be void for all purposes for want of necessary consent, a party to the transaction which has been void cannot be guilty of fraud if he relies on the Act and contends that the transaction is void. That is what the Act provides, and the statute must be enforced if its terms are invoked"**

36. In **Wamukola Vs Donati, Kisumu civil Appeal No. 6 of 1986**, the court of Appeal held as follows:

> **"An agreement to a controlled transaction becomes void for all purposes at the expiration of 3 months (now 6 months) after the making of the Agreement of the Application for the consent of the Land Control Board has not been made within that time. In this case no consent was applied for, and as a result, the agreement became void at the expiration of 3 months.**

37. I therefore agree with the Appellant's advocate's submissions that the order of specific performance that had been sought by the Respondent in the lower court could not have been granted in the absence of the consent of the Board. There was no agreement that the trial court could have ordered to be performed by the parties.
38. Section 7 of the Land Control Act provides that if any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under the Act, the money or consideration shall be recoverable as a debt by the person who paid it from the person whom it was paid. That is the only available recourse the Respondent has in this matter.
39. The Magistrate therefore erred in law when he granted to the Respondent an order of specific performance for an agreement which had become void for want of the Consent of the Land Control Board.

40. The Appellant further submitted that while this Appeal was pending, the Respondent sub-divided the suit property and sold the sub-divisions to third parties. The said third parties were enjoined in this Appeal as Interested Parties.

41. In **Malindi ELC case No. 55 of 2011,** I held that where a party to a suit transfers the suit property to a third party while the suit is pending, such a transfer is null and void. The common law principle of *lis pendens* is a principle of general application. The purpose of this principle is to preserve the suit property until the suit is finally determined. The doctrine is founded in public policy and equity.

42. In **Manwji vs U.S. International University and Another (1976-80) KLR 229** Justice Madan, while addressing the purpose of the principle of *lis pendens* adopted the finding in **Bellamy vs Sabine (1857) 1 De J 566, 584** where Turner L J held as follows:-

> **"It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendente lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendant's alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to be defeated by the same course of proceedings."**

43. In the same case, Cranworth L J observed as follows:

> **"Where litigation is pending between a Plaintiff and Defendant as to the right of a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding, not only on the litigating parties but also on those who derive title under them by alienation pending the suit whether such alienees had or had no notice of the proceedings. If that were not so, there could be no certainty that the proceedings would ever end…"**

44. The doctrine of *lis pendens* has also been discussed in the ***Treaties by Mulla & Gour on the Indian Transfer of Property Act.*** In ***Mulla, 5th Edition, page 245 and Gour, 7th edition, Vol.1, Page 579,*** the two authors state as follows:

> **"Every man is presumed to be attentive to what passes to the courts of justice of the state or sovereignty where he resides. Therefore, purchase made of property actually in litigation, pendente lite, for a valuable consideration , and without any express or implied notice in point of fact affects the purchase in the same manner as if he had such notice, and he will be accordingly be bound, by the judgment or decree in the suit."**

45. In view of the said doctrine, I do not agree with the submissions of the Interested Parties' Advocate that his clients are innocent purchasers for value without notice. The Respondent was aware of this Appeal. It was mischievous on his part to sub-divide and transfer the suit property during the dependency of the Appeal. Purchase made of a property *pendente lite* for valuable consideration affects the purchaser in the same manner as if he had notice and will be accordingly bound by the judgment or decree in the suit. The Interested Parties are therefore bound by the Judgment of this court

46. In the circumstances, and for the reasons I have given above, I make the following orders:

**(a) The Judgment and Decree of the Honourable Senior Resident Magistrate made on 5th February 2009 in Kilifi SRMCCC No. 188 of 2009 be and is hereby set aside.**

**(b) The Register in respect of Kilifi/Kijipwa/137 be rectified by cancellation of Titles Kilifi/Kijipwa 1333, Kilifi/Kijipwa 1334 and Kilifi/Kijipwa 1335 and parcel of land number Kilifi/Kijipwa 137 be restored in the name of Kidheka Mutsya Ngata.**

**(c) The Respondent to pay the Appellant the costs of this Appeal and the costs in the lower court.**

Dated and Delivered in Malindi this **19th** Day of **December,** 2013

**O. A. Angote**

**Judge**